BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL S. MESSNER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 253,153
CONTINENTAL PLASTIC CONTAINERS	)	& 261,143
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 20, 2011, Award of Administrative Law Judge Steven J. Howard (ALJ). Claimant was found to have suffered permanent injury to her right shoulder which arose out of and in the course of her employment with respondent and was awarded a 16 percent permanent partial functional impairment at the level of the shoulder in docket # 253,151. Claimant was also awarded a 12 percent permanent partial whole person functional disability followed by a 78.75 percent permanent partial general (work) disability in docket # 261,143.[1]

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, John B. Rathmel of Merriam, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ in so far as they do not contradict the stipulations discussed herein.

[1] As will be more fully explained in this decision, the ALJ, in the Award, and based upon an inaccurate communication from counsel, confused the dates of accident and the docket numbers in this matter. The Board discussed that confusion with the parties at the oral argument to the Board and pursuant to the stipulation with the parties, the confusion will be rectified herein.

The parties had earlier stipulated that claimant's average weekly wage without the inclusion of fringe benefits is $532.20. This calculates to a weekly benefit rate of $354.82. As claimant remained employed until April 25, 2001, her fringe benefits did not end until that date and her weekly benefit rate would not be the maximum weekly rate until April 26, 2001, when the fringe benefits were no longer being provided by respondent. The parties agreed that the Award wrongfully awarded benefits at the maximum weekly rate before the April 26, 2001 date when the fringe benefits would be properly added. That error will be corrected herein.

At oral argument to the Board, it was agreed that the date of accident claimed in docket # 253,153 is July 18, 1999. This date of accident was claimed on the original K-WC E-1 Application For Hearing filed on March 10, 2000. This date of accident was never amended throughout the litigation of this matter. However, in a letter dated May 11, 2011, the attorney for respondent advised the ALJ that docket # 253,153 had a maximum benefit rate of $401.00 per week. That maximum weekly rate would not apply to a July 18, 1999 date of accident. This error was clarified at oral argument to the Board. The parties agreed that docket # 253,153, with a date of accident on July 18, 1999, would have a maximum weekly benefit rate of $383.00.

Likewise, the parties agreed that, contrary to the letter of May 11, 2011, docket # 261,143 has a weekly maximum benefit rate of $401.00. Claimant filed the E-1 in docket # 261,143 on November 14, 2000, claiming a date of accident of October 31, 2000. This date of accident was amended when claimant filed an Amended Application For Hearing on March 19, 2001, claiming a date of accident from August 29, 2000 and continuing.

The parties also stipulated that claimant was paid 31 weeks of temporary total disability compensation (TTD) (July 18, 1999 to February 20, 2000) in docket # 253,153, with a maximum weekly benefit rate of $383.00. However, as claimant last worked for respondent on April 25, 2001, and as her fringe benefits continued through her last day worked, the weekly benefit rate would be based upon the agreed average weekly wage of $532.20, without the inclusion of the fringe benefit amounts. Therefore, any benefits ordered prior to April 26, 2001, will be paid at the weekly rate of $354.82.

Finally, the parties agreed that claimant's mileage reimbursement claim was ordered by the ALJ to be paid at 50 cents per mile. That order ignores the fact that many of claimant's medical appointments were incurred at a time when the mileage reimbursement amount was less than 50 cents per mile. The parties will confer and provide the Board with an agreed mileage chart showing the appropriate mileage benefit for the claimed dates of service. This agreement does not negate respondent's contention that claimant has failed to prove a work-related accident to her right shoulder. Any medical mileage benefits incurred for the right shoulder will depend on claimant's ability to satisfy her burden of proving that she suffered personal injury by accident to her right shoulder which arose out of and in the course of her employment with respondent.

The Board heard oral argument on August 19, 2011. E. L. Lee Kinch was appointed as Board Member Pro Tem for the purposes of this appeal, in place of Board Member Julie A.N. Sample.

ISSUES
(Docket # 253,153)

1. What is the nature and extent of claimant's injuries and disability? Respondent argues that once the permanent partial disability for the functional impairment is paid, claimant is entitled to nothing more. Claimant contends that once she stopped working on April 25, 2001, she became eligible for permanent partial general disability (work) compensation pursuant to K.S.A. 44-510e. Therefore, the Award of the ALJ should be either affirmed or modified to show that claimant is permanently and totally disabled as the result of the injuries suffered while working for respondent.

2. Is claimant entitled to reimbursement for mileage incurred while seeking medical treatment for injuries suffered while working for respondent? If so, at what rate should this mileage be assessed? The ALJ assessed the entire mileage claim at the rate of 50 cents per mile. Respondent argues that the rate should be adjusted based upon the date the medical treatment was received.

ISSUES
(Docket # 261,143)

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent on the dates alleged? Respondent denies that claimant suffered any injury after returning to work in February, 2000. Respondent contends that claimant was working light duty the entire time and no injury could have been suffered as the result of the light duty. Claimant contends that work activities after her return to work caused increased pain and worsened her condition, with the claimed body parts being the same as was claimed in docket # 253,153.

2. What is the nature and extent of claimant's injury and/or disability? Respondent contends that if claimant suffered any injury or injuries during this time, any award should be limited to her right shoulder pursuant to claimant's testimony.

3. Is claimant entitled to TTD for the weeks from April 26, 2001 through December 13, 2002, and from August 14, 2007, through June 5, 2008? Respondent disputes

claimant's entitlement to added TTD, arguing that claimant's return to work did not cause or aggravate her work-related injuries. Therefore, no TTD would be due for the subsequent treatment after claimant's employment with respondent ended on April 25, 2001. Claimant contends that she suffered added injury through her last day worked on April 25, 2001 which necessitated added treatment, including the shoulder surgery performed by Dr. Satterlee to claimant's right shoulder.

4. Is claimant entitled to reimbursement for mileage incurred while seeking medical treatment for injuries suffered while working for respondent? If so, at what rate should this mileage be assessed? The ALJ assessed the entire mileage claim at the rate of 50 cents per mile. Respondent argues that the rate should be adjusted based upon the date the medical treatment was received.

FINDINGS OF FACT

Claimant, a long term employee of respondent, having worked there since 1974, was working as a line inspector in 1999. This job required that she handle boxes which she would stack on skids, some of which required reaching over her head. She would also inspect bottles for leaks, requiring that she fill them with water and set them on a ledge. These bottles were from 12 ounces to 96 ounces. Claimant's job would require that she lift up to 35 pounds on a regular basis, with lifting over her head of up to 25 pounds.

On July 18, 1999, while walking, claimant's foot got caught in a string which was stretched across the floor. Claimant fell on some steel rollers, landing on her left side. The fall caused her neck to go sharply to the side and claimant heard her neck snap. Claimant experienced immediate pain and reported the accident to respondent but was not provided medical attention at that time. Eventually, claimant was referred to Dr. Roger Thomas, of Corporate Care Group and was sent to physical therapy. Claimant was also referred to Stanley A. Bowling, M.D. of the Dickson-Diveley Clinic. Dr. Bowling also recommended therapy. Claimant testified that the care and treatment being provided by Dr. Bowling was satisfactory.

However, claimant was sent by respondent to Ira H. Fishman, D.O. on January 28, 2000. Dr. Fishman referred claimant for an FCE, which claimant testified made her symptoms worse. After the receipt of the FCE, Dr. Fishman returned claimant to work on February 11, 2000, without restrictions. Claimant was off work for 29.57 weeks, during this period. Claimant returned to her regular job with respondent as a line inspector. Claimant's conditions began to worsen and she began to experience pain in her right upper extremity at the level of the shoulder.[2] Claimant testified that, while she was given restrictions by her family physician, respondent would not meet those restrictions. As claimant continued to perform her job duties, her condition began to worsen. Claimant last worked for respondent

[2] P.H. Trans. (Apr. 18, 2006) at 13.

on April 25, 2001, after reaching a point where she could no longer perform the duties of her job.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D. for an examination on February 18, 2000. Dr. Prostic diagnosed claimant with sprains and strains of her neck and back, superimposed upon pre-existing degenerative disk disease in the low back and trochanteric bursitis bilaterally. He opined that these diagnosed conditions were the result of the accident on July 18, 1999. He recommended additional medical treatment and job restrictions for claimant, including lifting no greater than 25 pounds occasionally, 10 pounds frequently and 5 pounds constantly. Claimant was to also avoid frequent bending or twisting at the waist, forceful pushing or pulling and the use of vibratory equipment or working in a captive position. He rated claimant at 15 percent permanent partial impairment to the whole body, including 5 percent for the cervical spine and 10 percent for the low back and hips. Claimant had no complaints to her right upper extremity at this time.[3]

Claimant was referred by the ALJ to board certified orthopedic surgeon Scott R. Luallin, M.D. for an independent medical examination on August 28, 2000. Dr. Luallin's history contained a description of the July 18, 1999 fall wherein claimant suffered injury to her left side, including her elbow, neck and low back. He diagnosed claimant with cervical thoracic strain, lumbar strain superimposed upon degenerative disc disease, left hip post-traumatic trochanteric bursitis, left SI joint arthropathy and a left elbow contusion. Claimant was rated pursuant to the AMA Guides, 4th ed., at 5 percent impairment to the whole person for the cervical thoracic injury, 5 percent impairment to the whole person for the low back injury and 2 percent impairment to the left upper extremity for the left elbow, which translates into a 1 percent whole person impairment, for a combined 10 percent whole person functional impairment. Dr. Luallin adopted the restrictions of Dr. Prostic, including 25 pounds lifting occasionally, 10 pounds on a frequent basis, 5 pounds on a continuous basis and claimant should use good lifting techniques and avoid forceful pushing or pulling.

Claimant was next examined by Dr. Prostic on February 12, 2001. At that time claimant continued with complaints to her neck and back but had also developed right carpal tunnel syndrome and right rotator cuff tendonitis. Dr. Prostic opined that the right upper extremity conditions were caused or contributed to by claimant's work with respondent beginning on August 29, 2000. He rated claimant at 15 percent impairment to the whole person for the cervical and low back complaints and gave claimant a 5 percent impairment on a functional basis for the right upper extremity complaints.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Terrence Pratt, M.D. on September 10, 2001. At that time, claimant had complaints of spinal, right upper extremity and left lower extremity discomfort. Dr.

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[3] At all times the ratings of Dr. Prostic are pursuant to the AMA Guides, 4th ed.

Pratt testified that claimant did not provide him with a history of any aggravation of her symptoms when she returned to work between August 2000 and April 25, 2001. He also did not have any specific findings at the level of the shoulder on the right side during his initial examination. However, his report of September 10, 2001, lists "intermittently discomfort with range of motion of her right shoulder".[4] Additionally, a pain diagram prepared by claimant displayed problems with her right upper extremity.[5] An MRI of the cervical spine showed some spurring and facet changes, or degenerative changes but no findings in the thoracic region.

Claimant was next examined by Dr. Pratt on August 21, 2002. Claimant did not complain of an increase in her symptoms from the time she returned to work on August 20 [sic], 2000, to her last day of work on April 25, 2001. She also made no specific reference to her right shoulder complaints. Claimant was diagnosed with cervicothoracic syndrome with cervical spondylosis and low back pain with multilevel degenerative disease. There were no complaints listed to the right upper extremity. Aqua therapy was recommended.

Claimant was next examined by Dr. Pratt on November 18, 2002. At that time, she had continued symptoms on the right side, pointing to the shoulder and parascapular area as well as the cervical region, mid back and low back. When claimant was next examined by Dr. Pratt on December 13, 2002, she indicated some improvement from the pool therapy with a decreased pulling in her left arm. She still had difficulty with pushing and pulling and standing and walking. Claimant reported aching in the right arm and cervical and parascapular area and burning across the low back and aching in the lateral aspect of the left thigh. Dr. Pratt had noted on more than one occasion that claimant had inappropriate responses on examination, with an initial notation of possible symptom magnification during the September 10, 2001 examination.

When Dr. Pratt last examined claimant on August 11, 2003, she still had subjective complaints with palpation of the cervical region, upper thoracic region, right parascapular area and bilateral lumbosacral region. He described claimant's condition as becoming more diffuse as claimant had multiple tender areas throughout the upper and lower extremities, as well as the chest wall, which had not been present initially.[6] Claimant was restricted to occasional lifting of 15-20 pounds with no frequent bending or overhead activities. Sitting and standing could be done frequently. Dr. Pratt opined that claimant was able to return to some form of substantial gainful employment in the open labor market. Claimant was limited to between the sedentary and light physical demand levels of work. Dr. Pratt was unable to relate the right upper extremity complaints to claimant's

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[4] Pratt Depo., Ex. 4 at 2 (Dr. Pratt's Sept. 20, 2001 IME report).

[5] *Id*. at 31.

[6] *Id*. at 18.

accident of July 18, 1999. Dr. Pratt acknowledged that the history given him included only the July 1999 accident with no information regarding any new allegations of injury. He agreed that repetitious use of one's right upper extremity could cause injury to the right shoulder.

Claimant was examined by Dr. Prostic for the third time on November 10, 2003. Claimant continued to have evidence of sprain/strain of her neck and back, trochanteric bursitis, rotator cuff disease of the right shoulder and right carpal tunnel syndrome. Dr. Prostic opined that claimant's injuries are the result of claimant's work with respondent beginning on July 18, 1999 and again from August 29, 2000. Claimant was rated at 24 percent impairment to the whole person, 15 percent impairment for the neck and back and 9 percent impairment to the whole body for the right upper extremity. Dr. Prostic increased the rating for the right upper extremity as he had earlier expected the right shoulder would improve. When it did not, he felt the higher rating was more appropriate. When claimant was examined by Dr. Prostic on July 21, 2008, he found the prior impairment ratings to claimant's cervical and lumbar spines to still be appropriate. He rated claimant's right shoulder at 20 percent impairment of the right upper extremity, for the rotator cuff injury and carpal tunnel syndrome.

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D. on February 21, 2006. Claimant was diagnosed with chronic cervicothoracic sprain, chronic lumbar sprain, a history of left elbow contusion and right acromioclavicular joint osteoarthritis. A complaint to claimant's right knee was determined by claimant and admitted to Dr. Carabetta to not be work-related. Dr. Carabetta testified that claimant's right shoulder complaints were not related to her job with respondent as according to his records, she had failed to voice those complaints until her visit with Dr. Prostic in November 2003. As claimant's employment with respondent ended in April 2001, symptoms two and a half years later would not be industrially related. Dr. Carabetta was advised that the February 12, 2001 report of Dr. Prostic referenced the right shoulder. He then testified that the right acromioclavicular joint injury appeared to be a new onset. He also agreed, within a reasonable degree of medical certainty and probability, that work activities could help further the progress of arthritis in the acromioclavicular joint. However insult or injury was not necessary to make that happen. Genetics could also create the added symptoms. Claimant had not been treated for the acromioclavicular joint problems until she was seen by Dr. Carabetta. Dr. Carabetta recommended x-rays, injections and possible surgery.

Claimant, on September 27, 2007, came under the care of Craig Satterlee, M.D., a surgeon. Dr. Satterlee, a shoulder specialist ordered an MRI of claimant's right shoulder. The MRI displayed a right supraspinatus tear. Dr. Satterlee determined that claimant needed surgery to repair her right rotator cuff. Claimant underwent a rotator cuff repair and a decompression surgery with distal clavicle excision in the right shoulder. Dr. Satterlee rated claimant at 14 impairment percent to the right shoulder pursuant to the AMA Guides, 4th ed.

Claimant was referred by respondent to board certified internal medicine specialist Chris D. Fevurly, M.D. for an examination on April 3, 2009. Dr. Fevurly was provided a history of the fall on July 18, 1999 and the subsequent recurrent injuries from August 29, 2000 through April 2001. Claimant was diagnosed with chronic cervical, thoracic and lumbar pain, since 1999, a T11 compression fracture, pre-existing the 1999 accident, multilevel degenerative disc disease of the lumbar spine and chronic cervicothoracic pain without evidence for cervical myelopathy or radiculopathy.

Dr. Fevurly opined that the work event of July 18, 1999, caused only a temporary aggravation of claimant's pre-existing degenerative changes in multiple levels of her spine. He noted the development of symptoms in the right shoulder, including impingement and rotator cuff tendinopathy in 2003, 2 years after she left respondent, followed by right shoulder surgery. In his opinion, the right shoulder symptoms were not related to claimant's work for respondent. Claimant had reached maximum medical improvement (MMI) from the 1999 accident by February 20, 2000, and was at MMI from the series of injuries through her last day worked, by June 2001. Claimant was assessed a 5 percent whole person impairment to the cervicothoracic spine and a 5 percent whole person impairment to the thoracolumbar spine from the July 18,1999 accident, with the ratings being pursuant to the AMA Guides, 4th ed. The need for restrictions stemmed from claimant's pre-existing degenerative conditions and not from her work-related injuries with respondent. In considering the task list of vocational expert Karen Crist Terrill, Dr. Fevurly determined that claimant was incapable of performing 8 of 20 tasks for a 40 percent task loss.

Claimant was referred by the ALJ to board certified orthopedic surgeon Thomas L. Shriwise, M.D. for an evaluation on October 1, 2009. Claimant provided Dr. Shriwise with a history of the fall on July 18, 1999. Dr. Shriwise noted the change in claimant's complaints to include the low back and neck pain during the time when claimant was receiving physical therapy, which she stated made her condition worse. He saw the work conditioning as being an aggravating factor to her earlier injuries. He determined that claimant was capable of returning to work performing light duty. Claimant was rated at 4 percent impairment to the right upper extremity (2 percent whole body) and 5 percent impairment to the whole body for claimant's thoracolumbar spine complaints. No rating was provided for claimant's cervical spine. The ratings were pursuant to the AMA Guides, but fail to specify which edition. However, the Order of the ALJ dated April 7, 2009, specifies that the opinion is to be pursuant to the AMA 4th ed. The Board finds that Dr. Shriwise properly followed the instructions of the ALJ's Order.

Claimant was reevaluated by Dr. Prostic on June 22, 2010. The diagnosis remained the same. However, Dr. Prostic opined that claimant was now realistically unable to return to gainful employment in the open labor market. At this time, claimant was 73 years old. Claimant's impairment ratings increased to 5 percent to the whole person for the cervical spine, 15 percent to the whole body for the lumbar spine and hips, which combine to 19 percent to the whole person, and 20 percent to the right upper extremity. He opined that

claimant was no longer able to perform 75 percent of the tasks contained in the task list of vocational expert Karen Crist Terrill.

PRINCIPLES OF LAW AND ANALYSIS
Docket # 253,153

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[10]

In determining the functional impairment loss suffered by claimant as the result of the July 18, 1999 accident, the ALJ evaluated and considered the rating opinions of several doctors who examined and/or treated claimant. The ALJ found that claimant had suffered a 12 percent whole person functional impairment after averaging the opinions of Dr. Shriwise, Dr. Prostic, Dr. Luallin and Dr. Fevurly. The Board finds the determination by the ALJ to be supported by this record and affirms same.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

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[7] K.S.A. 44-501 and K.S.A. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 44-501(a).

[10] K.S.A. 44-510e(a).

> together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[11]

Respondent contends that once claimant has been paid her full functional impairment from the July 18, 1999 accident, she no longer qualifies for additional benefits. Respondent provides no statutory or case law support for this position. Additionally, in it's submission letter to the ALJ, respondent argues for claimant to be compensated for her TTD, her functional impairment until her last day of work and then for "work disability commencing the day after her employment terminated, at the maximum rate, until the period of 430 weeks from the date of accident expires."[12] The Kansas Supreme Court, in it's decision in *Bergstrom*[13] discussed the interpretation of the statutory provisions in the Kansas Workers Compensation Act. As noted in *Bergstrom*, the most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.[14]

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[15]

Here, K.S.A. 44-510e is clear and unambiguous. Once claimant is no longer receiving compensation for wages equal to 90 percent or more of her average gross weekly wage from the date of injury, she becomes entitled to compensation for work disability. As of April 25, 2001, claimant was no longer employed, under the statute, she has suffered a 100 percent wage loss. Both Dr. Fevurly and Dr. Prostic provided task loss opinions in this record. The ALJ, in considering the 40 percent task loss opinion of Dr. Fevurly and the 75 percent task loss opinion of Dr. Prostic, found claimant to have suffered a 57.5 percent task loss. The Board finds no persuasive reason to give greater weight to the opinion of either doctor and affirms the equal consideration of both. Therefore, the determination by the ALJ of a work disability of 78.75 percent based upon a 100 percent wage loss and a 57.5 percent task loss is affirmed. The award of 31 weeks of TTD is modified. As noted above, claimant was off work from July 19, 1999 to February 11, 2000, a period of 29.57 weeks. TTD is awarded for that time period. The ALJ awarded TTD

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[11] K.S.A. 44-510e.

[12] Respondent's Submission Letter at 4.

[13] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[14] *Bergstrom* at 607, citing *Winnebago Tribe of Nebraska v Kline*, 283 Kan. 64, 150 P.3d 892 (2007).

[15] K.S.A. 44-510e.

through February 20, 2000. The Award of TTD shall be modified to grant TTD through February 11, 2000.

PRINCIPLES OF LAW AND ANALYSIS
Docket # 261,143

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[16]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[17]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[18]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[19]

This record contains significant dispute regarding the effect of claimant's return to work through her last day worked on April 25, 2001. Claimant contends that she aggravated her original injuries to her neck, back and left shoulder, plus added additional injury to her right upper extremity. However, the greater weight of the evidence supports a finding that claimant suffered only injury to her right upper extremity during the period from February 2000 through April 25, 2001. Dr. Satterlee, the treating physician found that

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[16] K.S.A. 44-501 and K.S.A. 44-508(g).

[17] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[18] K.S.A. 44-501(a).

[19] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

claimant had suffered a 14 percent functional impairment to the right upper extremity. Dr. Prostic, on the other hand, provided varying opinions of functional impairment over a period of several years, with the final functional rating being 20 percent to the right upper extremity. Neither Dr. Pratt, nor Dr. Carabetta found claimant's right upper extremity injuries to be related to her employment with respondent. However, it is questionable whether either had an accurate history regarding the timing of the onset of those right upper extremity problems. The Board finds that claimant suffered personal injury by accident through a series of traumas through her last day worked with respondent, April 25, 2001.[20] In considering the record, the Board finds that claimant suffered a 16 percent permanent partial functional impairment to her right upper extremity at the level of the shoulder. The Award of the ALJ on this issue is affirmed.

K.S.A. 44-510c(b)(1)(2) states:

> (b) (1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to 662.3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than $25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.
>
> (2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant was forced to leave her employment with respondent effective April 25, 2001, due to a worsening of her condition. Dr. Pratt, her treating physician testified that claimant reached MMI on December 13, 2002. Additionally, claimant underwent surgery for the repair of her right shoulder and was temporarily disabled from August 14, 2007, through June 5, 2008. Claimant was temporarily disabled for a period of 127.43 weeks and is entitled to TTD during this period.

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[20] See: *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

PRINCIPLES OF LAW AND ANALYSIS
Docket #'s 261,143 & 253,153

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[21]

Claimant argues that, due to the injuries suffered in both docket numbers, she is permanently and totally disabled. However, both Dr. Fevurly and Dr. Prostic found claimant capable of returning to work within specific restrictions. Dr. Prostic did not opine that claimant was permanently and totally disabled until he examined her in 2010, 11 years after the original accident date and 9 years after claimant last worked for respondent. At that time, claimant was 73 years old and long removed from the labor market. Additionally, vocational expert Karen Crist Terrill found claimant capable of returning to work. The Board agrees with the determination by the ALJ that claimant is not permanently and totally disabled as the result of her injuries suffered while working for respondent.

K.S.A. 2005 Supp. 44-510h states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 44-515 states:

> Medical examinations; travel and living expenses; availability of reports; disqualification of certain medical evidence; consideration of health care providers' opinions. (a) After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall

[21] K.S.A. 44-510c(a)(2).

so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer, but the employee shall not be required to submit to an examination oftener than twice in any one month, unless required to do so in accordance with such orders as may be made by the director. Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. If the employee is notified to submit to an examination before any health care provider in any town or city other than the residence of the employee at the time that the employee received an injury, the employee shall not be required to submit to an examination until such employee has been furnished with sufficient funds to pay for transportation to and from the place of examination at the rate prescribed for compensation of state officers and employees under K.S.A. 75-3203a and amendments thereto, for each mile actually and necessarily traveled to and from the place of examination, any turnpike or other tolls and any parking fees actually and necessarily incurred, and in addition the sum of $15 per day for each day or a part thereof that the employee was required to be away from such employee's residence to defray such employee's board and lodging and living expenses. The employee shall not be liable for any fees or charge of any health care provider selected by the employer for making any examination of the employee. The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be entitled to a copy of the report of any health care provider who has examined or treated the employee in regard to such claim upon written request to the employee or the employee's attorney within 15 days after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney.

(e) Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

K.A.R. 51-9-11 states:

(a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community. (b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions: (1) if an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker’s home; or

(2) if the worker, because of the worker’s physical condition, cannot drive and must therefore hire transportation to obtain medical treatment. Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public

> transportation, and ambulance service, if required by a physician, and for the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.
>
> (c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.
>
> (d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be determined by a hearing before a workers compensation administrative law judge.

The ALJ awarded claimant medical mileage as listed in Exhibit # 2 from claimant's regular hearing continuation by deposition, taken on July 9, 2010. However, the ALJ awarded the entirety of the mileage at 50 cents per mile. As noted in the exhibit, the travel for the examinations in question occurred over a several year period. The Board affirms the award of medical mileage for the number of miles listed in the exhibit. However, the amount of the award will be controlled by the maximum weekly compensation levels set by the Division on the date each travel expense was incurred. The mileage claims by claimant are ordered paid pursuant to the levels listed for the dates claimed by claimant in Exhibit # 2.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to accurately depict the proper average weekly wage, date of accident, maximum weekly benefit level, appropriate weeks of TTD and the mileage reimbursement amount as above ordered, but affirmed in all other regards.

DOCKET # 253,153

Claimant suffered an accidental injury on July 18, 1999, which arose out of and in the course of her employment with respondent, resulting in a functional whole person impairment of 12 percent, followed by a permanent partial general (work) disability of 78.75 percent. Claimant is awarded 29.57 weeks of TTD, based upon an average weekly wage of $532.20 and a resulting weekly benefit level of $354.82. With a date of accident of July 18, 1999, and a last day worked of April 25, 2001, the 12 percent functional impairment will fully pay out prior to claimant's last day worked. Therefore, the functional impairment will be paid at the reduced rate of $354.82. As claimant's permanent partial general (work) disability award of 78.75 percent will not begin until after claimant last worked for respondent, any work due and owing or which comes due in the future will be paid at the stipulated maximum rate of $383.00 per week.

DOCKET # 261,143

Claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent through her last day worked with respondent on April 25, 2001. Claimant suffered injury to her right upper extremity at the level of the shoulder for a 16 percent functional impairment to her right upper extremity. Claimant is entitled to 127.43 weeks of TTD compensation at the rate of $401.00 per week followed by 15.61 weeks of permanent partial disability compensation on a functional basis at the rate of $401.00 per week.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated May 20, 2011, should be, and is hereby, modified to accurately depict the proper average weekly wage, date of accident, maximum weekly benefit level, appropriate weeks of TTD and the mileage reimbursement amount as above ordered, but affirmed in all other regards.

DOCKET # 253,153

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Continental Plastic Containers, and its insurance carrier, American Home Assurance, in Docket # 253,153 for an accidental injury which occurred on July 18, 1999, and based upon an average weekly wage of $532.20 through April 25, 2001, and a stipulated maximum weekly compensation rate of $383.00 per week thereafter.

Claimant is entitled to 29.57 weeks of temporary total disability compensation at the rate of $354.82 per week or $10,492.03, followed by 48.05 weeks at the rate of $354.82 per week or $17,049.10, for a 12 percent permanent partial whole person functional disability, followed by 188.31 weeks permanent partial general disability at the weekly rate of $383.00 per week in the amount of $72,122.73, for a 78.75 percent permanent partial general disability making a total award not to exceed $100,000.00.

As of the date of this Award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

DOCKET # 261,143

WHEREFORE, A FURTHER AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Continental Plastic Containers, and its insurance carrier, American Home Assurance, in Docket # 261,143 for an accidental injury which occurred through a series

of accidents ending on April 25, 2001, and based upon an average weekly wage of $532.20 through April 25, 2001, and a stipulated maximum weekly compensation rate of $401.00 per week thereafter.

Claimant is entitled to 127.43 weeks of temporary total disability compensation at the rate of $401.00 per week or $51,099.43, followed by 15.61 weeks at the rate of $401.00 per week or $6,259.61, for a 16 percent permanent partial functional disability at the level of the shoulder, making a total award of $57,359.04.

As of the date of this Award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge